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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 173

JACK WALKER,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

JACK WALKER,
Pro Se.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justice of the Supreme Court of the United States, greetings:

Wherein comes now the petitioner, Jack Walker, appellant in the above entitled cause and petitions this Honorable Court for a writ of certiorari.

Summary of Subject.

Petitioner made application *in forma pauperis* to the U. S. District Court for the Northern District of California for a writ of *habeas corpus*—alleging that he had been deprived of his constitutional and statutory rights, and that the Warden (respondent)—was illegally restraining and

depriving petitioner of his rightful liberty by a "void process" of commitment, judgment and sentence in violation of the Constitution of the United States, Fifth and Sixth Amendments, Due Process, deprival of Counsel, and laws thereof, hence the judgment was void.

An order to show cause was issued by the District Court against the respondent, which subsequently after the return (which was only the *mittimus* of record) petitioner had been granted an attorney, and therefore a return was made by said attorney, the respondent filed three depositions in behalf of the United States said depositions being behind the record and of no account to a valid determination of the cause for said depositions were made by two United States Attorneys and a Deputy Marshal, petitioner was never given a fair and impartial hearing as the writ never issued and he was never produced in court to counter allege the depositions and to have a fair hearing into the cause of complaint, for he did not have opportunity to produce all the evidence he could have produced in said court, therefore the application was dismissed and the application and writ denied. (No opinion rendered.)

An appeal was granted from the order of denial to the Ninth Judicial Circuit Court of Appeals, and which resulted in an affirmance of the District Court's order.

WHEREFORE, comes now the petitioner, Jack Walker, and petitions this Honorable Supreme Court to grant and issue herein, a writ of certiorari to the Ninth Judicial Circuit Court of Appeals, San Francisco, California, for a transcript of all the necessary required portions of the records on cases #22969-R-D.C. and #9284 (C. C. A. 9), to this Honorable Court for a review thereon on appeal from the final order and decision of the Ninth Judicial Circuit Court of Appeals filed March 4, 1940, affirming the order of the District Court (on rehearing) denying petitioner's applica-

tion for a writ of *habeas corpus*—for a review of the legal and Constitutional law on the facts of said record in said denial—all of which will be raised herein as the questions of Constitutional law for review by this Honorable Court, and conjunctively pleaded as the errors of Constitutional law to the lower court in NOT SO HOLDING.

Jurisdictional Statement.

The Supreme Court of the United States is vested with jurisdiction to review on appeal in *habeas corpus* proceedings, the final order and judgment of the Circuit Court of Appeals by virtue of Section 463 (c) of Title 28, U. S. C., and governed thereunder through proceedings by the writ of certiorari provided for by Section 346-347 of Title 28 U. S. C.—also the act of February 13, 1925, ch. 229, 43 Stat. 936, Sec. 6 (c)—and as hereby applied for by the petitioner-appellant herein.

Facts and Questions Presented.

The legal question presented on the facts as cause for a *habeas corpus* in the District Court, and subsequently pleaded on appeal in the Ninth Circuit Court of Appeals as assigned errors to the lower court—and as herein now assigned as errors of law to the Ninth Judicial Circuit Court of Appeals in NOT SO HOLDING—and as now pleaded as invoking the jurisdiction of this Honorable Court on *habeas corpus*, and as reason for allowance of certiorari for a review thereof on appeal, are as follows:

I.

(A certified copy of the order of Judgment, Sentence #632 Criminal, of the U. S. District Court for the Northern District of Texas. R. 7-21.)

That there is nothing therein shown that the appellant had a counsel to defend him at his trial that he was never

asked if he had an attorney or if he wanted an attorney to defend him, and the record distinctly shows that he had no attorney, that nothing is shown he waived an attorney to represent him, and that not knowing of the rights guaranteed to him he could in no way competently waive a right he knew nothing about and that because he plead guilty under a duress does not make his sentence valid and does not deprive him of his right to counsel. And which upon ascertaining, reveals the fact that he had no attorney to defend him, and that he did not waive such right to counsel.

AND THE COURT BELOW ERRED IN LAW IN NOT SO HOLDING.

(Assigned Error 1.)

And a second Constitutional point of law and question raised, that the trial court by not appointing Counsel for the defendant petitioner herein lost jurisdiction to proceed and all proceedings from that moment on was void and a deprival of petitioner's right to due process of law.

AND THE COURT BELOW ERRED IN NOT SO HOLDING.

(Assigned Error 2.)

And as a third point in law and question raised is, can the affidavits be used against the petitioner, affidavits that are made by prosecuting officers that are men to convict and try to make their convictions stick, and affidavits that do not conform to the record and are not a part of the record, but behind and beyond the record, and by these affidavits to impeach the veracity of the petitioner who is only swearing to the record and is upheld by the record, the petitioner contends that this cannot legally be done.

AND THE COURT ERRED IN LAW IN NOT SO HOLDING.

(Assigned Error 3.)

And as a fourth point in law and question raised is, can a court just deny a petitioner without allowing him into court

to counter allege the returns and do whatever else he feels may be proper in the premises without having given him a chance to counter allege the affidavits and produce his own evidence in his own behalf. The petitioner contends that he must have a full and complete hearing and all evidence must be allowed and an opportunity given the petitioner to present his full cause.

AND THE COURT ERRED IN LAW IN NOT SO HOLDING.

(Assigned Error 4.)

The Circuit Court of Appeals cited no authority, either factual or legal for the interpretation of the constitutional points involved, and cited not one case out of the government's brief to sustain such position taken in law or the Constitution—and which also failed to answer in fact or law any of the contentions raised by the appellant.

The appellant in his reply brief had distinguished each case the government cited and relied upon in their brief, and presented to the honorable Circuit Court wherein they did not answer or apply adversely in law to the questions raised by the appellant—and this was evidently so, for the court in their opinion cited none of them to sustain their position taken, or any other authority.

Reasons Why Certiorari Should Issue.

Hence, to sum these said legal errors—the questions herein presented to the conclusional reason why a writ of certiorari should issue in this cause for a review thereof in the honorable Supreme Court, is as follows, to-wit:

The Ninth Judicial Circuit Court of Appeals in affirming the order of the District Court denying petitioner's application for a writ of *habeas corpus*, most likely ruled contrary and in conflict with their former decisions to the same questions of law on all questions presented by appel-

lant, and in conflict with decisions and rules of the honorable Supreme Court applicable to all questions presented—and which decision were presented in appellant's brief in support of his contentions.

It may be further noted that the *exact* circumstances and facts of petitioner's cause herein, which goes to the fundamental merit of the case and should have been decided, has never before been met and decided in any Federal court, and was not decided in this case although the appellant pleaded the proposition and supported it with general constitutional law and decisions applicable.

Wherefore: and because of the reasons as set forth above, the petitioner prays that this Honorable Court allow and issue a writ of certiorari directed to the Ninth Judicial Court of Appeals, San Francisco, California, for a review by this Honorable Court of their final order and decision affirming the District Court's denial of petitioner's application for a writ of *habeas corpus*—in order that petitioner's cause may be disposed of as law and justice require.

Respectfully submitted,

JACK WALKER,
Petitioner-Appellant.

Dated this 14 day of June, 1940, Alcatraz, California, by petitioner.

Argument and Authorities in Support.

As the facts and essential matters to a complete understanding of this cause have already been stated, appellant advances directly to his argument and law in support thereof.

In the exception of things, it is first pointed out that without doubt *habeas corpus* is the proper remedy, when one is deprived of his Constitutional rights, and that *habeas*

corpus will lie in such a case, as upheld by said authorities: *Johnson* v. *Zerbst,* 58 S. Ct. at p. 1025; *Brest* v. *Johnston, Warden,* (D. C.) #22862-L; *Ex parte Lange,* 18 Wall, U. S. at p. 163; *In re Snow,* 120 U. S. 274, 285, 7 S. Ct. 556; *Nielson,* petitioner, 131 U. S. 176, 9 S. Ct. 672; *Ex parte Peeke,* (D. C.) 144 F. at p. 1015; *Ex parte Siebold,* 100 U. S. 371, 375; *Ex parte Wilson,* 114 U. S. 417, 420, 5 S. Ct. 935; *Powell* v. *Alabama,* 287 U. S. at p. 45; *Avery* v. *State of Alabama,* 60 S. Ct. 321; affirming 188 So. 391, 237 Ala. 616. It was held by the Ninth Judicial Circuit Court in the case of: *Mackey* v. *Miller,* 126 F. 161; The court said:

> "The jurisdiction of a court or judge to render a judgment is always a proper subject of inquiry on habeas corpus; and if the court or judge had no jurisdiction to render it either because the proceedings of law under which they are taken are unconstitutional or for any other reason the judgment is void, and one who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus." Kaizi *v.* Henery, 211 U. S. 145; It was further held in the case of: U. S. *v.* Lair, 195 F. 47:
>
> "Where the court is without jurisdiction, release from custody may be obtained, notwithstanding the right of the defendant to challenge the validity of the court's action by writ of error." Anderson *v.* Denver, 265 F. at p. 3; Harlan *v.* McGourin, 213 U. S. 442, 31 S. Ct. at p. 44.

The appellant further states that all the points herein set out have previously been argued and set forth in motions and explained to the best of appellant's ability.

POINTS URGED.

Point One.

The appellant contends that he was deprived of his constitutional right by not being appointed a counsel to defend him and for his defense. The petitioner did not know that

he was entitled to counsel without cost, and he was helpless to procure counsel being without funds, and not being allowed to contact his friends to procure aid, therefore in no way could this appellant have waived his constitutional and fundamental right to be represented by counsel, and it is a well established rule, that the Federal courts have no power or authority to deprive an accused of his life or liberty unless he is represented by competent counsel, or unless he has waived this right, after his rights have been fully explained to him and he knows what he is entitled to and then competently waives it, this appellant not knowing of this right could in no way intelligently or competently or otherwise waive any right that he knew nothing about. As was stated by Mr. Justice Black in the case of *Johnson* v. *Zerbst* at p. 1023 (*supra*):

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege," and further stated at p. 1023 of Johnson *v.* Zerbst, (supra)
>
> "The constitutional right of an accused to be represented by counsel invokes of itself the protection of a trial court, in which the accused whose life or liberty is at stake is without counsel." Powell *v.* Alabama at p. 64; (supra); Brest *v.* Johnston, Warden, (supra). The Honorable United States Supreme Court at its last sitting handed down a case on counsel brought up from the State Courts and in words showed that it disapproved of the Courts not appointing counsel for defendants.
>
> U. S. C. A. Const. Amend. 14, Avery *v.* State of Alabama, 60 S. Ct. 321, affirming, 188 So. 391, 237 Ala. 616; where the court said:
>
> "Where denial of constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that United States Supreme Court scrupulously review the record."

In the Case of: Nabb *v.* U. S., 1 Ct. Cl. 173; the court held:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense." (U. S. Const. Amend. VI). The court always inquires of the accused upon his arraignment if he has counsel, and if he has none and lacks the funds with which to engage one, the court will assign Counsel to him. In Capital cases the Court is required to assign two counsels to him (18 U. S. C. 563). This assistance to indigent defendants is rendered by Counsel as one of their duties as officers of the court, and they receive no compensation therefor."

In a State case it states and goes further on a plea without Counsel and shows its disapproval in the case of:

Rhodes v. State (S. Ct. 2nd) at p. 393; where it states very emphatically:

"This court has expressed disapproval of trial courts receiving pleas of guilty from defendants charged with serious crimes, who are not represented by Counsel, until reasonable inquiry into the facts to discover whether a plea of guilty is entered freely and understandingly." Mislick *v.* State, 184 (2nd) 72, 110 N. E. 551; and again the same point was held in the case of:

Baker *v.* State, 130 Pac. at pp. 820, 821; Syllabus (I).

Where the Court said:

"It is the right of a person put upon trial for a criminal offense to be represented by counsel." Bill of Rights 20; Crime Proc. 6731 (Snyder's Comp. Laws 1909); and it has been further held in the constitution of the United States Sixth Amendment.

"In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense."

Therefore the right to counsel is a constitutional guarantee. The Sixth Amendment of the Constitution guarantees

that, "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense." Mr. Justice Black in *Johnson* v. *Zerbst, Warden*, 304 U. S. at pp. 462, 463, refers to the above amendment as follows: "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." "* * * If charged with crime, he is incapable generally, of determining for himself whether the indictment is good or bad. * * * He requires the guiding hand of counsel at every step in the proceedings against him." Appellant Walker, assuming that he did plead guilty, would, under the latest decision of the United States Supreme Court be entitled as a matter of right to counsel to advise him of his right under the indictment. The average indictment, and the one petitioner was sentenced upon is no different. It confuses most laymen and even some members of the bar. In short, as Mr. Justice Black has expressly held in the case cited (*supra*) "Counsel must guide every step in the proceedings," before one can plead guilty, or not guilty, to an indictment, the guaranteed right of counsel must be afforded him so that a defendant can protect his liberty if he is entitled to it. It cannot be doubted that the constitutional right to counsel may be waived by the defendant. Again referring to Mr. Justice Black in the *Johnson* v. *Zerbst, Warden,* case at p. 464 (*supra*), we find these remarks: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case including the background, experience and conduct of the accused."

Applying the Supreme Court's Rules of Waiver we find; a defendant with little or no education; a defendant who has come within the clutches of the law before, but never with the benefit of learning his rights as a defendant; a defendant never before a Federal court; a defendant easily scared as to a life sentence; and a defendant that was shown pictures of the scene of the crime; not allowed to send for his friends and a defendant forced into a plea of guilty, thereby forcing him to be a witness against himself, the court has only to look through petitioner's file to verify the illiteracy of the petitioner.

Public defenders are not commonly available in all jurisdictions, but assuming that upon demand counsel will be furnished in any given jurisdiction it is possible that many defendants do not avail themselves of that right because they are not aware of such a right.

It is true that the Constitution of the United States guarantees the petitioner the right of counsel at every stage of the proceedings, but how can a defendant, who probably never heard of the Constitution of the United States, know that he had such a right?

Appellant in the present case fits into the latter category. No one advised appellant of his right of counsel. United States Attorney Clyde O. Eastus (R. 17) in his affidavit goes into a long history of the appellant's case, but states at (R. 17) "The defendant Walker had no counsel, as he entered a plea of guilty." At (R. 17) "I asked him if he had a lawyer and he said that he did not want an attorney." This last statement is absolutely a falsehood, for this man at no time talked to appellant only to try to force him to plead guilty and to testify against his co-defendant. Because he could not force him to plead guilty, the U. S. Attorney admits in part at (R. 18) "I undertook to get him to testify for the government in this case * * *."

It will now be kindly noted by this Honorable Court as to the deposition here following and as to the contradictory evidence in two separate paragraphs.

Ass't U. S. Attorney Joe H. Jones, at (R. 18):

"I arrived in San Angelo on Saturday preceding the opening of court on Monday, for the purpose of preparing this case *for trial, thinking* that *both defendants intended to enter pleas of not guilty.*" (Italics supplied.)

(R. 19) "Prior to the calling of the case, District Attorney Eastus and I talked with defendant Walker in the United States Marshal's office, etc., Walker stated to the District Attorney and me that he intended to enter a plea of guilty; that he had no lawyer and did not desire one."

This appellant states that the last paragraph is false, perjured and biased.

At (R. 20) is a statement that is absolutely false as this man at no time talked to the appellant concerning his trial or what his intentions were as appellant did not even know where he was being taken or that he was to be tried or anything of that nature at that particular time.

It will now be noted that in the rebuttal to these affidavits although the appellant was not allowed to present all his evidence, it will be seen by a letter of the trial court as aforesaid that the clerk wrote to appellant at (R. 25): "Beg to advise that there is no waiver on file showing you forfeited your right to have an attorney. According to the records you entered a plea of guilty, and I know of no law which requires a waiver of attorney to be filed. The writer was not in the court room when your case was called, and I of course do not know just what was said by you, but it has not been the practice or custom to appoint an attorney to defend unless a plea of not guilty is entered, and it is shown that the defendant is unable to employ an attorney." It must be further shown that all these affidavits are prac-

tically made up of the same wording, it will further be noted and judicial notice taken of a letter received by the petitioner from the trial judge, a letter that was not used in the lower court for an exhibit and the only thing the Honorable Trial Judge had to say concerning the whole controversy.

This letter dated March 2nd, 1940; pertinent parts thereof are as follows:

> "I have your letter of February seventeenth. I recall quite distinctly, that you were tried in my court with another man who pleaded not guilty. Your plea was guilty. There was a lawyer who appeared in the case, and seemed to be conducting both your cause, and the cause of the other defendant, insofar as the preliminaries were concerned, * * *.
>
> It is my universal custom, to be sure that the party who enters a plea of guilty, knows what he is doing, and I have no reason to suspect that that was not done in your case."

The appellant contends in argument that nearly all affidavits and depositions he has seen or read as well as all letters from the courts all have the same well known axiom as stated in the last paragraph of this letter herein quoted, and it has seemed strange to the appellant that nearly all affidavits and depositions read alike. The appellant contends in argument that none of his depositions and letters or any of the respondent's are of any value, but that only the record of the case is what counts and what the courts can legally go by, and it is ridiculous to think or believe that any person, after handling hundreds of cases, can revert back to his memory years later and remember what was said by each and all that was done, and one cannot conceive of any United States Attorney trying to infer how good his memory is as to any particular defendant. As a matter of fact, the Honorable Judge William H. Atwell himself does not say that he asked appellant if he desired counsel. He

merely made no affidavit or deposition, he just remained mute on the subject. And in his letter to the appellant he just inferred that counsel represented appellant because he was defending his co-defendant, and if he did not represent him that the court never failed to inform one of his rights. Again under the Supreme Court Ruling, and taking into consideration petitioner's background, mentality and conduct, it is safe to assume that appellant did not waive his right to counsel, because he was not aware of the existing right.

Now referring to the Honorable Trial Judge above remaining mute, it must be further stated, that it is the duty of the trial court and Judge in order to determine whether there is an intelligent and competent waiver of counsel by the accused to see that such waiver clearly appears on record.

Again quoting the Supreme Court, 304 U. S. at p. 445 (*supra*):

> "The Constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused whose life or liberty is at stake * * * is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused, while an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court and it would be fitting and appropriate for the determination to appear upon the record."

In looking through appellant's record, what do we find? Nothing would be the appropriate answer, no transcript of the record to indicate what went on the day that appellant Walker was sentenced.

Interrogatories propounded to the trial judge resulted merely in arousing the Honorable Judge's ire. Judge W. H.

Atwell took the attitude that the dignity of the Federal Court was being lowered when asked certain pertinent questions (he remained mute); on the contrary, the dignity of the Court could best be preserved if proper and more adequate records were kept.

The United States Attorney and others that have made affidavits in this cause, assume that in the particular case at hand due process of law was adequately adhered to, because the general policy of their court is to adequately preserve due process of law.

What is due process of law?

Courts have been baffled from time immemorial. At best it is a conclusion of law. What we are trying to penetrate are the facts. One point remains undisputed. Honorable Trial Judge W. H. Atwell did not ask appellant if he desired counsel. The affidavits or depositions do not show that counsel was asked for and do not show that the Trial Judge offered counsel to the defendant and did not instruct defendant of his rights to counsel free of charge. It seems that it was presumed that if defendant had asked for counsel he would have been given one.

Yet the Supreme Court of the United States expressly holds that it is the duty of the trial judge to see that there is a proper waiver of counsel before another proceeding takes place.

The undisputed facts here show that no means were adopted by the trial judge to ascertain whether appellant waived his constitutional right to counsel. This should have been done before appellant's plea was entered, any other interpretation would make the Sixth Amendment and the decision of *Johnson* v. *Zerbst* (*supra*), a mere nullity. If defendants, such as appellant, does not get the protection of the constitutional right to counsel and the trial court does not completely satisfy the elements of an unequivocal

waiver, then the protection means nothing, because individuals who are well versed in the law and capable of protecting their rights, do not need the aid of counsel, but defendants, such as petitioner, should be given every right offered by the basic law of our land. It seems strange that persons and departments that caused the prosecution and obtained a conviction, should now make such statements at this time when they know them to be false? as for the great memory of these men, after many years have passed, it must be stated what a greater man than any of them or myself had to say.

Daniel Webster (1830) said:

> "Time is identical. Its subdivisions are all alike. No man knows one day from another, or one hour from another, but by some fact connected with it. Days and hours are not visible to the eye, nor to be apprehended and distinguished by the understanding. The flow of time is known only by something which makes it; and he who speaks of the date of occurrences with nothing to guide his recollection speaks at random and is not to be relied on." Works of Daniel Webster 8th Ed. 1854, Vol. VI, p. 82, quoted from "The Murder of Capt. Joseph White, at trial," and in 1857 Justice Wayne further strengthened Daniel Webster's view in Simpson *v.* Peaslee, where he said relative to time, "The term period in relation to time acts as a pointer, a distributor or sharer portioner." Justice Wayne pays high tribute to Daniel Webster as a "jurist, orator, and statesman", at Savannah, Ga. in 1847; Vol. 2 (8 ed.) p. 399 Works of Daniel Webster.

It must be conceded that without records the appellant surely could more fully remember what occurred, as it was directly against him and something that time could never erase from his memory as to the anguish and punishment that has been accorded him while under this sentence and therefore no one could recall the time and the circumstances

like he himself can recall, and surely his word is to be relied on more than any one else's word when he is the one that has suffered, and especially when the records support his contentions against and above the contentions of the United States Attorney.

Point Two.

The petitioner further contends, that although the Honorable trial court had jurisdiction over the person and subject matter, that by depriving the defendant appellant herein of his fundamental, constitutional and lawful rights the trial court lost jurisdiction, and every step taken from that moment on that was taken by the Honorable Court was without law and against the appellants right to due process of law; that although the appellant plead guilty a jury was impaneled to hear the cause although no attorney was appointed showing that the judge was not sure if appellant was pleading guilty or not, and the jury (R. 16-17) did hear the cause. That a deprival of an attorney and for the court to proceed was without law has been held in numerous cases as especially in the case of *Powell* v. *Alabama,* at p. 64 (*supra*) *Ex parte Lange,* 18 Wall. U. S. at p. 170; *Johnson* v. *Zerbst, Warden,* at p. 1024 (*supra*) states:

> "If the accused however is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth (6) Amendment stands as a jurisdictional bar to a valid conviction and sentence, depriving him of his life or his liberty."

The United States Constitution Fifth (5) Amendment also holds that:

> "No person shall be deprived of life, liberty or property, without due process of law."

Point Three.

The appellant further contends that by the trial court depriving appellant of his constitutional and fundamental rights under the Fifth (5) Amendment and Sixth (6) Amendment to the United States Constitution, lost jurisdiction to proceed and everything they done was void.

Therefore it is the earnest plea of this appellant that the jurisdiction of the Honorable trial court was lost, that the judgment is void and release from imprisonment may be obtained and is proper by *habeas corpus*, and was so stated by the Supreme Court of the United States in the case of *Johnson* v. *Zerbst*, at pp. 1024, 1025 (*supra*):

> "If the requirement of the Sixth (6) Amendment is not complied with the court no longer has jurisdiction to proceed."

The Federal courts are vested jurisdiction by the fundamental law of the Supreme Court of the United States, by the Constitution of the United States, and any act committed by these courts that are repugnant to the said Supreme law are of no force and invalid. The United States Constitution says, Art. III, Sec. II, at p. 414:

> "The jurisdiction of the federal courts is limited by the Constitution; but the courts thus created possess no jurisdiction but what is given them by the power which creates them."
>
> *Brest* v. *Johnston, Warden; Mackey* v. *Miller; Kaizi* v. *Henery; Harlan* v. *McGourin; Ex parte Coy; Ex parte Lange;* al. previously cited (*supra*) and *Stephens* v. *Biddle*, 20 F. (2d) 662.

Point Four.

The appellant further avers that as he could in no way question the affidavits against him, and as he was not taken into court so that he could produce all his evidence that he

was deprived of a fair and impartial hearing, and as the affidavits are behind the record and made years after, that they should not have been used against him, to impeach his testimony, and as although he had been practically forced into pleading guilty and being a witness against himself and nothing having been shown contrary to his allegations that are of record his word surely must stand in a law court when all his allegations are of record. The United States seems to be the only one allowed to obtain depositions and affidavits in their favor, and as he was not brought into court to testify in his own behalf and make counter allegations to said affidavits, for as he could and was not allowed in any way to file counter thereto or a questionari to said depositions to test the memory of the witnesses making said depositions, therefore and as a right and justice to said appellant said depositions should not have been used and should have been stricken from the records, and the court proceed therein by the records of the court before them.

In the case of *Johnson* v. *Zerbst*, 58 S. Ct. at 1019 (*supra*) there were two affidavits used to impeach the contentions of the appellants, and they were only referred to by this Honorable Court and then otherwise completely ignored, and it was there held that they were not of record, and neither are these affidavits of record in this case, but are only forms from Government officers produced by them on a questionnaire of other Government officers. There are numerous cases to uphold the petitioner's contentions and allegations on this particular point.

In the case of *Dowdell* v. *United States*, 221 U. S. 325, the Court said:

> "The provisions of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give the

testimony in his presence, and give to the accused an opportunity of cross-examination.

"It was intended to prevent the conviction of the accused upon depositions or ex-parte affidavits and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right to cross-examination."

It was also held in the case of *Dewitt* v. *Berry,* 134 U. S. 307, 10 S. Ct. 536, and in *Jenkins* v. *Preston,* 186 Fed. 609 that:

"Except where the terms of a written contract are obscure, uncertain, or indefinite, oral evidence is not admissible to add to change or contradict them."

Although these depositions are not oral testimony they were taken from such to impeach the record of the trial court, and it will be further noted in the State case of *Mills* v. *Commonwealth,* 13 Pa. 627, and the case of *United States Ex rel. Vallota* v. *Ashe,* at p. 742, where the court said:

"I need not repeat the authorities which established that consent cannot give jurisdiction. In criminal proceedings especially, that axiom has grown with the growth and strengthened with the strength of the law. Trials by lynch law might otherwise be valid; but at times I dare to say a man might consent to their jurisdiction, in hope or in fear, or perhaps in ignorance, * * * some affidavits and some certificates of such consent were produced at bar, but the counsel for the defendant positively deny it on their affidavits. But we can regard neither the one or the other; they are not part of the record, nor can they be made such. But for myself I think it a matter of no account, and if the prisoner had appeared in court, and under his sign manual, on the record, agreed to be then tried, it would not have the slightest influence with me. I look to the law of the land."

It is further stated in the rules of the Federal District Courts, rule 33:

> "The adverse party, shall have the right to cross-examine all witnesses appearing against him, either orally or in writing or both."

It further seems that at Title 28 U. S. C. A., Sec. 639, that this title and section does not allow affidavits to be used in the court against one unless the party involved was there to hear the making of such affidavit and allowed to question the persons making them, and is further strengthened by Title 18 U. S. C. A., Sec. 264:

> "On appeal from conviction the appellate Court must take the record as presented."

Ross v. *U. S.*, 93 F. (2d) 950, and *Diaz* v. *United States*, 223 U. S. 442, hold to the same rule as *Dowdell* v. *United States* (*supra*). Title 18 U. S. C. A., Sec. 241, states that:

> "On cross-examining defendant as to collateral matter, the Government must take his answers, and cannot introduce evidence to contradict it."
>
> *U. S.* v. *Sager*, 49 F. (2d) 725.

And in closing this point the appellant cites, and wishes the Court's attention to Judicial Code, Sec. 169:

> "In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said Court shall prescribe; and like opportunity shall be afforded the claimant in cases where testimony is taken on behalf of the United States, under like regulations."
>
> R. S. 1083; Mar. 3, 1911, C. 231, 169, 36 Stat. 1140.

As has been also stated herein the appellant by being forced to be a witness against himself, by threats and prom-

ises and by a coercing influence on the appellant, and whatever might have been thought of the law prior to the case of *Brown* v. *Mississippi*, 297 U. S. 278, it was by that decision established:

> "That in a proper case an accused must not be forced to be a witness against himself, nor to be deprived of his liberty without due process of law."

And that he must have the equal protection of the laws. The issue, of whether the appellant in the instant case was deprived of his constitutional rights, is therefore presented under the fifth and sixth and fourteenth Amendments, and upon the facts of the instant case it must be held, it is submitted, that he was deprived of those rights.

The Sixth Amendment declares:

> "In all criminal prosecutions, the accused shall enjoy the right to be represented by counsel."

And the fourteenth declares that:

> "No State shall deny to any person within its jurisdiction the equal protection of the laws."

As is further averred the appellant was without funds to employ counsel to advise him, he is practically illiterate; he had no one to give him assistance, financially or otherwise; and was strictly forbidden to call up his relatives. He stood indicted for a very serious crime, where practically the maximum could have been most of his life. He was under the coercive influence of an able United States Attorney, a prison guard and the Assistant United States Attorney, and he was in a very precarious situation. These three adroit and quick-witted officers of the law promised and threatened and demanded he plead guilty, a trial by an attorney to uphold petitioner's rights as granted by the constitution, it is one of, the fundamental safeguards

against the tyranny and injustice of courts and is the cope-stone of our democratic form of government, and that a person does not have to plead guilty is one of the most sacred rights given us under our great constitution; and it was clearly the intent of congress in the enactment of Title 18 U. S. C. A. Section 564 to enter a plea of not guilty if the defendant stood mute, and by compelling this appellant to be a witness against himself brings the instant case squarely within the meaning of *Brown* v. *State of Mississippi* (*supra*). In the *Brown* case, the accused had been convicted upon confessions obtained by third degree methods and his constitutional right against self incrimination was thus denied. The accused was represented by counsel and it was contended that failure of counsel to move for the exclusion of the confession, operated as a waiver of the constitutional right against self incrimination. The Supreme Court held that the demand of this right was not a mere error which could be thus waived by the attorney for the accused, but was an error which rendered the trial a nullity, Mr. Chief Justice Hughes at p. 286, of *Brown* v. *State of Mississippi* (*supra*):

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void."

In the case of: *Weeks* v. *U. S.*, 232 U. S. 392, the Court said:

> "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices, destructive of rights secured by the federal constitution, should find no sanction in the judgment of the courts".

Counselman v. *Hitchcock,* 142 U. S. 562, the Fifth Amendment to the United States Constitution also states that:

> "Nor shall be compelled in any criminal case to be a witness against himself."
> *Silverthorne Lumber Co., Inc.* v. *U. S.,* 40 S. Ct. 182.

In closing the appellant avers that he believes he has a meritorious cause for complaint and that he is entitled to the relief he seeks by a writ of *habeas corpus* and by certiorari in this Honorable Court.

Conclusion.

The Federal Constitution of the United States, and its amendments, and all other United States and State Courts, as well as the highest tribunal in the land, the Honorable Supreme Court of the United States, as well as truth and logic, all combine to support the petitioner's contentions.

To permit of such a would-be construction as the case here at bar before this Honorable Supreme Court of the United States, would allow manifold other American citizens to be put under the same circumstances at the whim or caprice of any United States Attorney, just in order to gain a conviction.

That the appellant here may be said to have erred in the drafting of this particular instrument, cannot militate against the proper legal and constitutional conclusions. That the petitioner is entitled to the rights and protection afforded every citizen of the United States. In as much as it appears from the records before this Honorable Court, that the trial court lost its jurisdiction, and that all their proceedings from that moment on was void and a violation of the appellant's rights by the bill of rights, the law and the Constitution of the United States, as well as its amendments.

Hence it is earnestly urged that the sentence is unjust, illegal, and against the United States Constitution, and should be voided, as law and justice require, and that therefore the writ should issue, and he be released from further illegal restraint.

Prayer.

WHEREFORE: your appellant prays, that an order of Writ of Certiorari issue, and that the case be remanded back ot the lower court with instructions that the writ issue and the appellant be released from further confinement, and if sufficient cause is shown, that this Honorable Court itself issue the writ of *habeas corpus* and release the appellant forthwith, as provided for by law. Also for these cogent reasons herein set forth, petitioner will then be allowed to go hence, and petitioner will ever pray.

Respectfully submitted,

JACK WALKER,
Petitioner-Appellant, in Pro. Per.